MICHIGAN SUPREME COURT

Office of Public Information

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MONEY SEIZED IN SPEEDING STOP AT ISSUE IN ORAL ARGUMENTS NEXT WEEK; CLAIMANT ARGUES THAT FOURTH AMENDMENT BARS FORFEITURE

LANSING, MI, March 1, 2007 – Money that a state trooper discovered in a rental car's trunk and seized during a speeding stop is at issue in a case that the Michigan Supreme Court will hear next week.

The Court will hear oral arguments in *In Re Forfeiture of $180,975.00*, in which the claimant seeks to have the money returned. The state trooper violated her Fourth Amendment rights against unreasonable search and seizure by searching the trunk without her consent, the claimant argued. But the trial court ruled that the money was forfeited and the Michigan Court of Appeals agreed, citing a 1988 Court of Appeals decision which held that "illegally seized property is forfeitable . . . so long as the probable cause for its seizure can be supported with untainted evidence, and any illegally seized property is excluded from the forfeiture proceeding." The prosecution had offered evidence other than the money to prove, by a preponderance of the evidence, that the claimant was a drug courier taking the money to Chicago for a drug buy, the Court of Appeals said. The claimant contends that there was no untainted evidence and that the trial court violated the exclusionary rule by admitting evidence about the seized money's existence, source, and purpose.

The remaining nine cases feature Freedom of Information Act, Open Meetings Act, professional malpractice, insurance, governmental immunity, employment, and criminal law issues.

Court will be held on **March 6 and 7** in the Supreme Court's courtroom on the sixth floor of the Michigan Hall of Justice in Lansing. Oral arguments will begin at **9:30 a.m.** each day.

(*Please note: The summaries that follow are brief accounts of complicated cases and may not reflect the way in which some or all of the Court's seven Justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available on the Supreme Court's web site at* http://courts.michigan.gov/supremecourt/Clerk/msc_orals.htm. *For further details about the cases, please contact the attorneys.*)

Tuesday, March 6
Morning Session

IN RE FORFEITURE OF $180,975.00 (case no. 127983)
Prosecuting attorney: Michael J. Bedford/(269) 657-8236
Attorney for claimant Tamika Shante Smith: Karri Mitchell/(248) 968-2400
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Lori Baughman Palmer/(313) 224-2698
Trial court: Van Buren County Circuit Court
At issue: While searching a car, a state police trooper discovered $180,975 in cash in the trunk; the car's driver did not consent to the search. The prosecutor brought a forfeiture action in which the money itself was not introduced into evidence. Did the prosecutor prove by a preponderance of the evidence that the money was subject to forfeiture? How does the exclusionary rule – which has been applied to exclude evidence police obtained in unconstitutional searches and seizures – apply in a forfeiture proceeding where the property subject to forfeiture was seized illegally?
Background: Tamika Shante Smith was stopped for speeding while traveling west on I-94 in a rental car. After a Law Enforcement Information Network (LEIN) search revealed that Smith was driving on a suspended license, she was ticketed for that offense and for speeding. The state trooper who made the stop conducted an unconsented-to search of the car's trunk and discovered $180,975 in a backpack. The trooper seized the money; the prosecutor later filed a complaint for forfeiture. Smith moved to dismiss the action and have the money returned, arguing that the nonconsensual search of the vehicle violated her Fourth Amendment rights. Following a bench trial, the court entered a judgment of forfeiture. Smith appealed, and the Court of Appeals affirmed in an unpublished opinion on the basis of *In re Forfeiture of United States Currency*, 166 Mich App 81, 89 (1988), which held that "illegally seized property is forfeitable . . . so long as the probable cause for its seizure can be supported with untainted evidence, and any illegally seized property is excluded from the forfeiture proceeding." There was such untainted evidence, the Court of Appeals said: (1) in the three months preceding the stop, Smith had rented a car at least four times for three days each time, driven each for several hundred miles, and could not recall where she had driven; (2) according to her tax records, Smith generally earned between $4,000 and $5,000 a year, and had no income in one year; and (3) expert testimony established that I-94 is a major drug corridor between Detroit and Chicago, that such transactions are almost always cash-based, that the cash usually travels west to Chicago and the drugs travel east, and that rental cars are the preferred mode of transportation. Accordingly, the trial court properly found that the prosecution had proven, by a preponderance of the evidence, that Smith was a drug courier and the money was to be used to buy drugs, the appellate court said. Smith appeals.

LASH v CITY OF TRAVERSE CITY (case no. 131632)
Attorney for plaintiff Joseph Lash: Robert D. Kent-Bryant/(810) 235-5660
Attorney for defendant City of Traverse City: Mary Massaron Ross/(313) 983-4801
Attorney for amicus curiae Michigan Municipal League: Rosalind Rochkind/(313) 446-5522
Trial court: Grand Traverse County Circuit Court
At issue: The city required certain employees, including police officers, to live within 20 "road miles" of city limits. Because the job applicant's property was determined to be 23 "road miles" away from city limits, the city withdrew its conditional offer of employment to the applicant. Can the applicant sue the city for money damages? Is the city's residency requirement consistent with MCL 15.602, which prohibits a local unit of government or school district from requiring any employee to live less than 20 miles from the nearest boundary of that unit or district?

Background: Joseph Lash answered an ad seeking police patrol officers for Traverse City. The ad described the city's residency requirement, which requires certain city employees to live within 20 road miles of the city limits. The city offered Lash a job, conditioned on his passing a physical examination, a psychological examination, and a physical endurance test. The city then discovered that the property where Lash intended to reside, if he was hired, was more than 20 road miles from the city limits. The city then withdrew its conditional offer of employment. Lash sued, seeking money damages for the city's purported "unlawful failure to hire" him as a police officer. He cited MCL 15.602, which provides that a local unit of government may not require its employees to live "within a specified geographic area or within a specified distance or travel time from his or her place of employment as a condition of employment or promotion by the public employer." But the statute does allow an employer to require that "a person reside within a specified distance from the nearest boundary of the public employer" so long as that distance is 20 miles or greater. Lash alleged that the city's residency requirement violated MCL 15.602 by requiring employees to live within 20 road miles, as opposed to linear miles, of the nearest city limit. Lash claimed that his property was within 20 miles of the city, if measured by radius rather than road miles. But the trial court granted the city's motion for summary disposition and dismissed Lash's case, finding that the city's requirement was consistent with MCL 15.602 and enforceable. Lash appealed, and the Court of Appeals reversed the trial court in a published decision. Two appeals court judges held that MCL 15.602(2) only contemplates straight line measurements, not "road miles." As a result, these judges held, the city's residency requirement was more restrictive than permitted by MCL 15.602 and was unenforceable. A majority of the panel also agreed that Lash could sue the city for money damages. The case was remanded for further proceedings. The city appeals.

AUTO CLUB GROUP INSURANCE COMPANY v BUERKEL, et al. (case nos. 131439-40)

Attorney for plaintiff Auto Club Group Insurance Company: John A. Lydick/(248) 646-5255

Attorney for defendant Karen Boshaw-Weaver: John A. Lydick/(248) 646-5255

Attorney for defendant State Lanes, Inc.: Michele Riker-Semon/(248) 335-5450

Trial court: Saginaw County Circuit Court

At issue: A woman unsuccessfully tried to stop her angry, drunken boyfriend from driving her car, which he drove regularly on other occasions with her consent. Several minutes later, her boyfriend struck another vehicle and injured the plaintiff, who then sued the car owner, her insurance company, and her boyfriend. MCL 257.401(1) states that "[t]he owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge." In this case, was the car driven with the owner's "express or implied consent or knowledge"? Are the vehicle owner and her insurance company liable for the injuries the owner's boyfriend caused?

Background: Karen Boshaw-Weaver allowed her boyfriend, Christopher Buerkel, to use her car on a near-daily basis. Buerkel had a set of keys to the car, contributed about $100 a month toward paying for the vehicle, and helped pay for gas. After a party at State Lanes, Inc., a bowling alley and bar, Buerkel, who had been drinking, jumped into the driver's seat. Boshaw-Weaver argued with him; she tried to get him out of the car and take his keys. She entered the car on the passenger side, but Buerkel began driving away with the passenger door open. Boshaw-Weaver persuaded Buerkel to pull into a parking lot, where she shut the car off, but was unable

to remove Buerkel's keys from the ignition. Buerkel restarted the car and reentered the street. Seeing a car approaching, Boshaw-Weaver shouted at Buerkel to stop. Buerkel slammed on the brakes, but collided with another vehicle, injuring passenger Amie Smith. Smith sued Buerkel for negligence and named Boshaw-Weaver as a defendant, invoking the owner's liability act, MCL 257.401(1). Smith also named State Lanes as a defendant under a dram shop liability theory. After investigating the collision, Boshaw-Weaver's insurer, Auto Club Group Insurance Company, brought a declaratory judgment action, claiming that it owed no coverage under its policy because Buerkel was not a permissive user of the vehicle and did not fall within the definition of an insured. The trial court agreed that Auto Club had no duty to defend or indemnify Buerkel. The trial court also ruled that Boshaw-Weaver was not liable under the owner's liability act because, at the time of the accident, Buerkel did not have Boshaw-Weaver's consent to drive the vehicle. Smith and State Lanes appealed to the Court of Appeals, which affirmed in an unpublished opinion. State Lanes appeals.

PEOPLE v EARLS (case no. 132284)
Prosecuting attorney: Brenda S. Sanford/(810) 648-3402
Attorney for defendant Thomas James Earls: David B. Herrington/(989) 269-6492
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Jerrold Schrotenboer/(517) 788-4283
Attorney for amicus curiae Wayne County Prosecutor's Office: Timothy A. Baughman/(313) 224-5792
Attorney for amicus curiae Fraternal Order of Police, Michigan State Lodge: Mark A. Porter/(248) 409-1911
Trial court: Sanilac County Circuit Court
At issue: Numerous investigative subpoenas were issued to third parties for phone records and the defendant's banking and business records during the investigation of this home-invasion and safe-breaking case. The subpoenas failed to conform to statutory requirements for obtaining investigative subpoenas. Does the defendant have standing to raise the statutory violations? If so, should the evidence obtained through the subpoenas be excluded?
Background: During a home invasion, a safe containing $130,000 in cash and other valuables was stolen. While the crime was being investigated, and before the prosecutor filed formal charges, the prosecutor obtained numerous investigative subpoenas directed to third parties. The third parties were ordered to produce various items – including phone records, bank records, and business records – believed to connect Thomas James Earls to the crime. After obtaining this and other evidence, the prosecutor charged Earls with several crimes. Earls moved to suppress the evidence obtained through the subpoenas; he argued that the subpoenas violated MCL 767A.1 et seq., which set procedures for obtaining investigative subpoenas. The trial court granted Earls' motion. On appeal, the prosecutor argued that, although the subpoenas did not comply with the statute, the evidence should not be suppressed. In addition, Earls did not have standing to challenge the subpoenas, the prosecutor maintained. The Court of Appeals affirmed the trial court's ruling in a divided and unpublished opinion. The dissenting judge concluded that Earls had no standing to object to the issuance of the investigative subpoenas; moreover, the evidence should not be excluded because of the prosecutor's failure to comply with the statute, the dissenting judge said. The prosecutor appeals.

Afternoon Session

RAAB v JOYCE (case nos. 129247-8)
Attorney for plaintiffs Ranee Lee Raab and Richard Raab: John J. Schutza/(248) 737-9101
Attorney for defendant Robert F. Joyce, D.O.: David M. Ottenwess/(313) 965-2121
Trial court: Montcalm County Circuit Court
At issue: In this medical malpractice case, the plaintiffs sued a board-certified general surgeon who is an osteopathic doctor. Their medical expert on the standard of care is a board-certified general surgeon who is a medical doctor, not a D.O. Is the expert qualified to testify against the defendant doctor?
Background: Ranee Raab underwent hysterectomy and bladder suspension surgeries performed by Robert F. Joyce, an osteopathic doctor and board-certified general surgeon. Raab experienced complications and had another surgery performed by a urologist. Raab and her husband sued Joyce for medical malpractice; they claimed that Joyce was negligent in performing the surgeries without first consulting a urologist and obstetrician/gynecologist. As support for this allegation, the plaintiffs sought to call Dr. Marc Cooperman, a medical doctor who is also a board-certified general surgeon, to offer standard of care testimony. On the eve of trial, Joyce filed a motion to strike Cooperman as a witness, arguing that Cooperman was not qualified under MCL 600.2169 and MRE 702 to testify regarding the standard of care applicable to Joyce. The trial court agreed, finding that the practices of a general surgeon who is an M.D. are not "necessarily the same as" the practices of a general surgeon who is a D.O. The judge also concluded that Cooperman's clinical practice was not the same as Joyce's. After precluding Cooperman from testifying, the trial judge dismissed the plaintiffs' lawsuit. In an unpublished opinion, the Court of Appeals reversed the trial court. The appeals court held that Cooperman was qualified to testify at trial because he, like Joyce, was a board-certified general surgeon and practiced in that field. Joyce appeals.

GRACE v LEITMAN (case no. 131035)
Attorney for plaintiff Harvey Grace: Mark Granzotto/(248) 546-4649
Attorney for defendants Bruce Leitman and Bruce Leitman, P.C.: Christine D. Oldani/(313) 983-4796
Trial court: Oakland County Circuit Court
At issue: The plaintiff sued his lawyer, and the lawyer's law firm, for legal malpractice. To support his malpractice claim, the plaintiff produced an affidavit from an expert witness who testified that the defendant lawyer breached the standard of care. The trial court granted summary disposition to the defendants and dismissed the plaintiff's case. Was the defendant lawyer's strategy reasonable as a matter of law? Or does the affidavit from the plaintiff's expert witness create a genuine issue of material fact, under the principles discussed in *Simko v Blake*, 448 Mich 648 (1995), and other applicable law?
Background: When Harvey Grace and his wife Brooke Grace divorced in 1990, they entered into a separation agreement to split their marital assets evenly; the estate's value was based on figures Harvey Grace provided. Shortly afterward, his ex-wife came to believe that she had been deceived about the value of one of the assets, and she sued Grace for fraud. In a 1998 trial, the ex-wife's expert witness testified that Grace's share in Grace & Wild Studios, Inc. – an asset Grace valued as worthless in the divorce – was probably worth $4 to 6 million. Grace's attorney, Bruce Leitman, challenged the expert's credibility but did not call an expert witness to support

Grace's claims that the asset had no monetary value. It is undisputed that, at the time, Leitman was aware that another expert had given a deposition in an earlier lawsuit valuing the asset at $0; it is also undisputed that Leitman falsely told Grace that he had retained this expert. The jury ultimately ruled in the ex-wife's favor and awarded her just over $3 million. In 2002, Grace sued Leitman and his law firm for legal malpractice, based largely on Leitman's failure to call any expert witness to counter the ex-wife's expert. The defendants moved to dismiss the case, arguing principally that Grace's theories were barred because Leitman's actions constituted a good-faith exercise of professional judgment. Grace's response included an affidavit from another attorney, who described how Leitman's actions fell below the applicable standard of care. Leitman's conduct was a direct and proximate cause of the result in the fraud case, the attorney opined. But the trial court dismissed the case, finding that Grace "failed to present evidence that [the] Defendants' actions were not in good faith or were based on anything other than an honest belief well founded in the law and in the best interest of their client." The Court of Appeals affirmed in an unpublished per curiam opinion. Grace appeals.

Wednesday, March 7
Morning Session Only

BUKOWSKI, et al. v CITY OF DETROIT (case no. 129409)
Attorney for plaintiffs Diane Bukowski and Michigan Citizen: Jerome D. Goldberg/(313) 393-6005
Attorney for defendant City of Detroit: Jeffrey S. Jones/(313) 237-5065
Attorney for amicus curiae Michigan Press Association: Dawn L. Hertz/(734) 995-3110
Trial court: Wayne County Circuit Court
At issue: The plaintiffs sought disclosure, under the Freedom of Information Act, of a report prepared by a police department. The trial court found that portions of the report, with the factual findings and summaries, were within the "frank communications" exemption, MCL 15.243(1)(m), and the "personnel records of law enforcement agencies" exemption, MCL 15.243(1)(s)(ix), but that purely factual portions were not exempt. The Court of Appeals reversed and remanded, concluding that the trial court's analysis was inadequate. The appellate court offered guidance as to how the trial court should analyze the two exemptions on remand. Did the Court of Appeals properly construe the statute?
Background: After the city of Detroit denied their Freedom of Information Act (FOIA) request, reporter Diane Bukowski and the Michigan Citizen newspaper sued the city. The plaintiffs sought a report prepared by the city's police department concerning Detroit Police Officer Eugene Brown, who was accused of being involved in multiple fatal shootings of civilians, and the department's response to Brown's conduct. The city denied the request, citing several FOIA exemptions. The trial court agreed in part, finding found that certain portions of the report, along with the related factual findings and summaries, were exempt from disclosure under the "frank communications" exemption, MCL 15.243(1)(m), and the "personnel records of law enforcement agencies" exemption, MCL 15.243(1)(s)(ix). The purely factual portions of the report, however, were not exempt from disclosure, the court ruled. The city appealed to the Court of Appeals, seeking exemption of the entire report, and the plaintiffs cross-appealed, seeking disclosure of the entire report. In a unanimous unpublished decision, the Court of Appeals reversed and remanded, finding that the trial court had provided inadequate analysis to support its application of the two FOIA exemptions. The appellate court offered guidance as to the

proper analysis of the two exemptions on remand. The city appeals.

ROSS v AUTO CLUB GROUP (case no. 130917)
Attorney for plaintiff Randall L. Ross: Jules B. Olsman/(248) 591-2300
Attorney for defendant Auto Club Group: John A. Lydick/(248) 646-5255
Trial court: Macomb County Circuit Court
At issue: In this auto no-fault case, the plaintiff sought to recover personal protection insurance benefits from the defendant insurer. The defendant claimed that the plaintiff, the sole owner of a subchapter S corporation, was self-employed and not entitled to benefits under *Adams v Auto Club Ins Ass'n*, 154 Mich App 186 (1986). The trial court rejected the defendant's argument and, relying on MCL 500.3148(1), ordered the defendant to pay attorney fees to the plaintiff on the ground that it "unreasonably" refused to pay benefits. Was the defendant properly ordered to pay attorney fees?
Background: After he was injured in an automobile accident, Randall Ross submitted a claim to Auto Club Group for first-party no-fault personal protection insurance benefits. At that time, Ross was the sole shareholder and employee of Michigan Packing Company, Inc., a meat packing business incorporated as a subchapter S corporation. The parties could not agree whether Ross was a company employee or was self-employed. Ross argued that he was an employee, but Auto Club took the position that Ross was self-employed and that, under *Adams v Auto Club Ins Ass'n*, 154 Mich App 186 (1986), he could not establish a claim for lost wages. The trial court granted Ross' motion for summary disposition. The court agreed with Auto Club that Ross was self-employed, but rejected Auto Club's argument that *Adams* applied. The court concluded that Ross had established a claim for lost wages. Accordingly, the trial court granted plaintiff's request for attorney fees under MCL 500.3148(1), which states: "An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that *the insurer unreasonably refused to pay the claim* or unreasonably delayed in making proper payment" (emphasis added). Explaining the award of attorney fees, the trial court stated that Auto Club "provided no legitimate justification, no legal authority, no rational or logical arguments" in support of its claim that Ross was not entitled to benefits. Auto Club appealed. On the question of attorney fees, the Court of Appeals stated, in a published opinion, that it was not left with a definite and firm conviction that the trial court made a mistake in ordering Auto Club to pay attorney fees to Ross. It affirmed the trial court's award of fees. Auto Club appeals.

BAKER v COUCHMAN, et al. (case no. 131607)
Attorney for plaintiff Jason Baker: Joshua R. Fields/(734) 954-0100
Attorney for defendant Michael Couchman: Timothy J. Mullins/(248) 457-7020
Trial court: Livingston County Circuit Court
At issue: The plaintiff, a sheriff's deputy, was employed as a school resource officer (SRO) under a written "partnership" agreement between the sheriff and the school district. Under the agreement, the school district paid a portion of the SRO's salary and had the right to participate in the selection, supervision, and removal of the SRO. The sheriff ended the officer's SRO assignment after the superintendent of schools concluded that the plaintiff was unsuitable for that assignment. The officer sued the superintendent for tortious interference with business relations. Is the superintendent immune from suit?

Background: Jason Baker, a deputy with the Livingston County Sheriff's Department, was assigned to be the school resource officer (SRO) for Pinckney Community Schools. Baker claims that he initially had a good working relationship with Pinckney school officials, including Michael Couchman, the superintendent. But Baker and Couchman disagreed over Baker's handling of several incidents on school property. Ultimately, Couchman asked that Baker be removed from the SRO position. The sheriff agreed, and Baker was returned to road patrol duty. Baker sued, alleging that Couchman interfered with and disrupted his employment relationship with the Livingston County Sheriff's Department. Couchman filed a motion for summary disposition, arguing that he was entitled to governmental immunity from Baker's claim for tortious interference with a business relationship. Couchman supported his argument with MCL 691.1407(5), which provides that a "judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority." The trial court denied the motion, and Couchman appealed to the Court of Appeals. In a published opinion, the Court of Appeals affirmed the trial court's ruling, with one judge dissenting. Couchman appeals.

OMDAHL v WEST IRON COUNTY BOARD OF EDUCATION, et al. (case no. 131926)
Attorney for plaintiff Torger G. Omdahl: Torger G. Omdahl/(906) 265-5116
Attorney for defendants West Iron County Board of Education, Robert Han, M.D., James Quayle, Donald Autio, James Burkland, Eric Malmquist, Beth Vezzetti, and Christine Shamion: Sara J. Basso/(906) 265-4410
Attorney for amicus curiae Attorney General: Thomas Quasarano/(517) 373-9100
Attorney for amicus curiae Michigan Association of School Boards, Michigan Municipal League, and Public Corporation Section of the State Bar of Michigan: Brad A. Banasik/(517) 327-5929
Trial court: Iron County Circuit Court
At issue: An attorney sued the defendant school board, his former client, for allegedly violating the Open Meetings Act. Is he entitled to attorney fees?
Background: Torger Omdahl, an attorney, sued the West Iron County Board of Education and its individual members, alleging that they violated the Open Meetings Act (OMA) by engaging in illegal closed sessions at a May 18, 2004 meeting. Omdahl alleged that, after the closed sessions, the defendants voted to fire Omdahl as the Board's attorney. The defendants moved to dismiss his lawsuit. The trial court rejected several of Omdahl's claims, but found that the defendants had violated the OMA by failing to take and maintain minutes at the May 18, 2004 closed sessions. The court ordered the defendants and their successors in office to "take and maintain minutes of executive sessions at all future meetings" pursuant to the OMA. But the court declined to award Omdahl court costs and actual attorney fees under the OMA; the court concluded that Omdahl, although an attorney, was acting in his personal capacity and that "there was no attorney appearing on behalf of the plaintiff." Omdahl appealed. In a published opinion, a majority of the Court of Appeals panel reversed the trial court and remanded the case to the trial court with instructions to grant Omdahl attorney fees and costs. The dissenting judge would not have awarded attorney fees because they were not "actually incurred" in the case. The defendants appeal.

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